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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

DANIEL L. MEDLOCK, ET AL. ..... *Petitioners*

VS.

TIMOTHY J. LEATHERS, ET AL. ..... *Respondents*

CITY OF FAYETTEVILLE, ARKANSAS ..... *Intervenor*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

## BRIEF IN OPPOSITION

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## SUMMARY OF ARGUMENT

I.

The Petitioners erroneously argue that upon remand to the Arkansas Supreme Court, the Arkansas Supreme Court misapplied the rational basis standard of review applicable to Equal Protection analysis. The Equal Protection Clause does not mandate for rational-basis review purposes that the reviewing Court determine the legislature's actual purpose or rationale supporting the tax classification. Rather, the reviewing Court may properly conceive or hypothesize a rational basis for the classification for purposes of tax imposition which are rationally related to achieving a legitimate governmental objective. Upon remand, the Arkansas Supreme Court is not constrained by prior classifications made for First Amendment analysis purposes regarding the various communication media segments. The Arkansas Supreme Court may properly determine whether significant differences exist within a media segment (the classification of cable distribution of television programming and satellite broadcast distribution) to form a rational basis for imposition of the Arkansas Gross Receipts Tax.

II.

The Cable Communications Policy Act of 1984 established franchise procedures and standards to encourage the growth and development of cable systems. (47 U.S.C. §521) The local franchise authority may impose a franchise fee for use of public rights of way. However, imposition of a franchise fee does not preclude any tax, fee or assessment of general applicability. [47 U.S.C. §542(g)(2)(a)] The Arkansas Gross Receipts Tax may be levied upon any person with

respect to cable service provided over the cable system. [47 U.S.C. §542(h)(1)] Classifications for purpose of taxation are presumed constitutional, requiring great deference be given to the legislative classification. Levy of the Arkansas Gross Receipts Tax by Act 188 of 1987 upon cable television services purchased by a subscriber from the cable operator is expressly permitted by federal law and not subject to federal preemption.

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## BRIEF IN OPPOSITION

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## REASONS FOR DENYING THE WRIT

### I.

***UPON REMAND TO CONSIDER PETITIONER'S EQUAL PROTECTION ARGUMENT, THE ARKANSAS SUPREME COURT PROPERLY APPLIED THE RATIONAL BASIS STANDARD OF REVIEW. THE JUDICIARY IS ABLE TO CONCEIVE OF A RATIONAL BASIS REGARDING THE ARKANSAS GENERAL ASSEMBLY'S TAX CLASSIFICATION IN ACT 188 OF 1987 AT ANY TIME.***

The U. S. Supreme Court in *Leathers v. Medlock*, 499 U.S. ___, 113 L.Ed.2d 494, 111 S.Ct. 438 (1991) held that

differential treatment of selected segments of the print and electronic communications media is not prohibited by the First Amendment to the United States Constitution. Upon remand, the Arkansas Supreme Court was directed to consider the Petitioner's Equal Protection argument regarding Arkansas' tax classification between cable television services and satellite dish reception of television signals resulting from Act 188 of 1987. *Leathers*, 113 L.Ed.2d, at 508. Under this distinction, the service of providing cable television services was taxed by Act 188 of 1987, but not the reception of satellite transmitted signals directly received by individual satellite dish owners. Act 769 of 1989 subsequently eliminated this distinction, subjecting to tax television distribution services whether made with or without the use of wires.

The Petitioner has acknowledged in its Petition for Certiorari that it bears the burden of proving that the classification made by the Arkansas General Assembly in Act 188 of 1987 is palpably arbitrary and does not advance a legitimate state purpose. Petition for Certiorari, page 11. The Petitioner acknowledges further that laws to some extent are inherently unequal, with wide deference being given to state legislatures to classify taxpayers to meet local economic and regulatory needs, and that classifications do not have to be drawn with mathematical precision. *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992); *Allegheny Pittsburgh Coal Co. v. County Commissioner*, 488 U.S. 336 (1989); *Madden v. Kentucky*, 309 U.S. 83 (1940). The judiciary reviews the reasonableness of the classification established by the legislature to determine if the classification is rational. Under this rational basis scrutiny applicable to this case on remand, if the classification furthers a proper governmental purpose, Equal Protection afforded by the 14th Amendment to the United States Constitution is not violated.

In remanding this case, the U.S. Supreme Court reiterated the standard of review from the Equal Protection case of *Madden v. Kentucky*, 309 U.S. 83, 84 L.Ed.2d 590, 60 S.Ct. 406 (1940), wherein the Court held that:

> . . . broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *Leathers*, supra, at 506-507.

a. A Rational Basis May Be Conceived At Any Time

The Arkansas Supreme Court in reviewing the classification by Act 188 of 1987 upon remand, determined that a rational basis for the classification existed. The Court stated:

> We originally determined cable and satellite to be 'the purveyors of a particular medium.' (citations omitted) That 'particular medium,' video programming, is the end result of both cable and satellite. Because of the

> characteristics of television programming the process can be divided into several classes based on transmission techniques. Cable, both basic and premium, depends upon a sophisticated transmission system requiring substantial investments by cable companies. Satellite, however, merely requires installing a satellite dish by the user, as does an antenna user installing an antenna. The sophisticated transmission system is not needed. Descrambled satellite is only different from satellite in that it requires special programming at the programming location which is usually out of state. Even though the end result of the video programming is similar, satellite and cable providers transmit their signals to viewers in different ways; therefore, a distinguishable classification at the initial state of programming exists. 842 S.W.2d 428, at 431-432.

In making this distinction, the Petitioner argues that an inappropriate standard of review has been applied by the Arkansas Supreme Court. Specifically, the Petitioner argues that facts or an objective basis must exist to form an evidentiary record for the Arkansas Supreme Court's decision, the absence of which requires the matter be remanded to the trial court to develop additional facts. Petition for Certiorari, page 13. In essence, the Petitioner submits that the judiciary's ability to independently conceive or hypothesize a rational basis for Equal Protection purposes can never exist unless the underlying evidentiary record supports the analysis. Such is not the state of the law. Special Justice Mourton of the Arkansas Supreme Court in addressing this issue on remand, stated:

> [Petitioner] argue(s) that hypothesizing a rational basis, . . . should be beyond the power of this court. We view

> hypothesizing a rational basis the same as conceiving a rational basis; a practice that is available to the courts without question. We point to the language in *Streight* and conclude that any rational basis for a taxation statute may be developed at any time. 842 S.W.2d 428, at 431.

The Arkansas Supreme Court then quoted approvingly from *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983):

> In any event, the judiciary is allowed to hypothesize and . . . reach a conceivable basis for the exemptions which [it] conclude[s] are rational, reasonably distinctive and not arbitrary. It causes us to defer to legislative purpose because there is a rational basis for the tax. . . .
>
> Before it is said that such hypothesizing is far afield, we re-emphasize that our role is not to discover the actual basis for the legislation. Our task is merely to consider if any rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purposes. 280 Ark., at 214-15.

b. The Actual Basis For The Tax Classification Need Not Be Known

Most recently, the U.S. Supreme Court in *Nordlinger v. Hahn*, 505 U.S. ___, 120 L.Ed.2d 1, 112 S.Ct. 1156 (1992) in determining that California's assessment system did not violate the Equal Protection Clause to the U.S. Constitution, held that for purposes of review, the actual basis for the classification need not be known. In allowing the Court to

independently conceive of a rational basis, Justice Blackmun stated:

> . . . the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S., at 179, 66 L.Ed.2d 368, 101 S.Ct. 453. See also *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969) (legitimate state purpose may be ascertained even when the legislative or administrative history is silent). Nevertheless, this Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-529, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959). (citations omitted)

In reaching the decision that there was a rational basis for the classification in Act 188 of 1987, the Arkansas Supreme Court adopted the rationale advanced by the Intervenor, City of Fayetteville. The Court held:

> Even without such deference Act 188 will survive the rational basis test when we apply the intervenor's argument. Arkansas, primarily a rural state, may classify between satellite and cable because the state needs satellite television transmission in those geographic areas where cable services are not feasible. We acknowledge other conceivable rational bases for the arguments that were addressed at oral argument but we are not compelled to discuss them here. One conceivable

rational basis is enough to pass the test. 842 S.W.2d 428, at 431.

While the Arkansas Supreme Court did not base its decision on oral arguments by Counsel, it acknowledged that other conceivable rational bases existed which would form additional justification for the tax levied by Act 188 of 1987. No useful purpose would be served by prolonging this litigation by having those equally valid rational bases advocated during oral argument, but not relied upon by the Arkansas Supreme Court, further developed in the U.S. Supreme Court. Neither is any remand to the trial court necessary to develop additional facts as advocated by the Petitioner. It is clear the Arkansas Supreme Court has the ability to conceive of rational bases for the tax distinction made by the Arkansas General Assembly in Act 188 of 1987 without further remand to the trial court. *Nordlinger*, supra.

c. Additional Rational Bases Exist To Sustain Act 188 of 1987

The Arkansas Supreme Court has acknowledged that there are other rational bases for sustaining the tax distinctions made in Act 188 of 1987. These arguments may be conceived of independently by the Courts and form an additional basis to deny the Petition. *Nordlinger*, supra.

i.

Distinction Based on Tax Already Paid by Viewer

A distinction can be conceived based on the newly developing capability of broadcasting satellite signals prior to the passage of Act 188 of 1987. Under this rationale, the

service of cable television is a newly emerging industry. As the new technology developed, only those businesses or individuals that could make significant investments in satellite dish technology could afford to purchase the equipment necessary to receive signals from satellites. Consequently, cost was the limiting factor which prohibited dish antennas from springing up across the United States and Arkansas. Because of the cost factor two groups were created: 1) isolated individual owners of satellite dish antennas which received signals for personal consumption; and 2) cable businesses formed to rebroadcast by cable satellite transmissions for profit to subscribers.

If the Arkansas General Assembly conceived this to be the state of the industry prior to enacting Act 188 of 1987, there were substantial economic differences involved in the acquisition of satellite signals. In the first category, persons investing money in individual satellite dishes, had already paid tax on those purchases of tangible personal property levied by Ark. Code Ann. §26-52-301(1) (1987). In the second category, the cable subscriber had not paid any tax on tangible personal property since he or she was receiving the signal by cable. Consequently, for purposes of the sales tax, the Legislature's classification by Act 188 of 1987 to only tax cable services was reasonable in light of the taxes already paid by individual satellite dish owners.

ii.

Distinction Based on Access to Information

It is also conceivable, and relied upon by Special Justice Mourton in the decision for the Arkansas Supreme Court, that the Arkansas General Assembly perceived that owners of

satellite dishes were predominant in the rural areas of this state. These rural dish owners had unequal access to cable television services provided in the urban metropolitan areas of this state. In order to facilitate the spread of information and access to the wider range of broadcasting to the rural citizens, the Legislature chose not to further hinder their limited access by imposing a tax upon their use of satellite signals.

iii.

Distinction that Satellite Dish Reception Not Within Existing State Tax Collection System

If the Arkansas General Assembly considered owners of satellite dish antennas to be isolated from the normal sales tax collection mechanism, not including them as part of the service of cable television subject to tax makes sense. Since the isolated users merely consume the satellite signal, there is no vendor to whom they would pay tax since there is no tangible personal property being sold. Creating a method to enforce a sales tax upon these isolated users would be difficult if there were no cost for the signal they were using. Even if there were a cost upon which to calculate the tax, the Legislature may have thought that creating a collection mechanism to enforce and administer the tax in this special situation might be perilous or even cost more to administer than the revenue it might create. It is also conceivable that this type of tax might have been largely unenforceable and would generally create noncompliance with the tax law or even tax avoidance such that the integrity of the tax system itself would be undermined.

iv.

Distinction Made Upon Tax Avoidance
Rather Than Compliance

The scrambling of satellite signals, adds a new factor to the equation. It is conceivable that the scrambling only occurred because satellite dish technology came within the economic reach of significant numbers of persons in the United States, such that those numbers represented an increasingly larger loss of revenues to broadcasters. At some point the "isolated" pirating of signals was no longer a de minimis problem. To cure the unauthorized use of the signal, scrambling came into existence. In order to receive the signal and save the investment in satellite dish receiving equipment, decoding devices (descramblers) were offered for sale to satellite dish owners.

It was testified at the original trial, that when descramblers were sold, they were subject to tax as a sale of tangible personal property. However, the money charged for access to a premium channel — $8.00 monthly — was not subject to tax since the service of receiving scrambled satellite transmissions was not specifically taxed as one of the specifically enumerated taxable services in Arkansas law.

Prior to this case, the General Assembly may have considered persons receiving scrambled satellite broadcasts isolated users not within the sales tax collection system existing in the State of Arkansas. If there were no charges after purchase of the descrambler device, there was nothing upon which to compute tax. Or, if there were charges, the extension of the tax to scrambled satellite transmissions, considering the number of individual dish owners and the

charges, could have been of the de minimis variety, resulting in the cost of administration of that facet of the tax law outweighing the revenue generated. Thus in a cost and effect analysis, extension of the tax to some scrambled satellite signal users didn't make economic sense.

Another factor may have been purely an enforcement problem. Were the persons receiving the scrambled satellite signal lawfully in possession of the descrambling device? If not, would those individuals have complied with a state tax law taxing those signals voluntarily? Would the Department have an unenforceable law? If the law were passed, would there have to be some extraordinary inspection remedies? Would this law affect the integrity of the taxing system and encourage tax avoidance rather than tax compliance?

Certainly all of these conceivable bases could form an independent judicial basis to uphold the classification made by Act 188 of 1987. No useful purpose would be served to remand this litigation to the trial court as advocated by Petitioner.

d. Law of The Case Doctrine Inapplicable On De Novo Review

The Petitioner erroneously advocates "law of the case doctrine" requires the Arkansas Supreme Court on remand to adhere to the classification of cable and satellite television reception as similar media segments. Petition for Certiorari, page 13. This classification was originally utilized by the Court when conducting the First Amendment analysis between various print and electronic media. The Equal Protection analysis conducted by the Arkansas Supreme Court on remand is fundamentally different from the analysis previously

conducted during the original consideration of *Leathers* on First Amendment grounds. Rather than comparing intermedia segments under the First Amendment challenge, such as newspapers and magazines to the video programming industry, the Arkansas Supreme Court properly conducted a review of intramedia classification, taxation of cable transmission versus satellite transmission. This different analysis under Equal Protection as applied to Act 188 does not violate "law of the case doctrine." The application of the different Equal Protection analysis to Act 188 of 1987, rather than a change in any underlying facts has resulted in the decision which Petitioner seeks to have reviewed.

As advocated by the Petitioner, "law of the case doctrine" denies the Arkansas Supreme Court, or any court on remand, the considerable flexibility and discretion in reviewing cases traditionally exercised by the judiciary. *Ferguson v. Green*, 266 Ark. 566, 587 S.W.2d 18 (1979). "Law of the case doctrine" is further inappropriate in this litigation as tax matters are reviewed de novo by the Arkansas Supreme Court. *Pledger v. Baldor International, Inc.*, 309 Ark. 30, 827 S.W.2d 646 (1992). In view of the reversal on First Amendment grounds by the U.S. Supreme Court and remand for de novo consideration of Equal Protection in this case, "law of the case doctrine" is inapplicable.

II.

## *FEDERAL COMMUNICATIONS POLICY ACT OF 1984 ESTABLISHED NATIONAL POLICY. THE ACT DID NOT PREEMPT LEGITIMATE STATE LEGISLATION NOR TOTALLY OCCUPY THE FIELD OF CABLE COMMUNICATIONS.*

Petitioner erroneously argues that the Cable Communications Policy Act of 1984 (47 U.S.C. §521 et seq.) preempts the imposition of a general sales tax and that the tax levied by Act 188 of 1987 is an unduly discriminatory tax upon cable television services. The discrimination argument is a restatement of Petitioner's challenge to the classification created by Act 188 of 1987 and already responded to in Respondent's analysis of the rational basis for the tax levy.

The Arkansas Supreme Court on remand determined that there was no federal preemption in the area of cable communications. Special Justice Mourton stated:

> When Congress passed the Cable Act, it intended to create a national policy governing cable communications while at the same time providing guidelines for state and local authority to regulate cable systems. 47 U.S.C. §521(1), (3) (1988). Once Congress left the door open for state and local governments to regulate, it did not intend to preempt any legitimate state legislation; nor did it totally occupy the field of cable communications. It is possible to comply with both state and federal laws, likewise, the state statute does not stand as an obstacle to Congress' purpose. Act 188 fits within the area of discretion left by the Cable Act to allow state and local communities to regulate and tax cable services as they

choose. We therefore dismiss the preemption issue. 842 S.W.2d 428, at 433-434.

In order for federal preemption to be applicable under Article 6, Section 2 of the United States Constitution, the sales tax levied by Act 188 of 1987 must conflict with federal law or interfere with the achievement of a federal objective. *Goldstein v. California,* 412 U.S. 546, 37 L.Ed.2d 163, 93 S.Ct. 2303 (1973). Since the Cable Communications Policy Act of 1984 contemplates imposition of state taxes upon cable television operators and subscribers, express preemption under federal law is inapplicable. Likewise, as the Cable Communications Policy Act of 1984 contains language indicating a division of responsibility between federal, state, and local governments, preemption is inappropriate.

a. The Purpose of The Cable Communications Policy Act of 1984

The predominant objective of the Cable Communications Policy Act is to make the local franchising process the primary means of cable television regulation. This has the benefit of ensuring that the public receives the widest possible diversity of information service and sources, in a manner which is responsible to the means and interests of local communities. *Rollins Cablevue, Inc. v. Saienni Enterprises,* 633 F.Supp. 1315 (1986). As enunciated in 47 U.S.C. §521, the purposes of the Act are to:

1. establish a national policy concerning cable communications;
2. establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are

responsive to the needs and interests of the local community;

3. establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

4. assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

5. establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

6. promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

In the absence of preemptive language or other evidence that the extension of the general sales tax levied by Act 188 of 1987 to cable television services impedes or is an obstacle to the accomplishment of any of the stated purposes of the Act, preemption is inapplicable.

The Act by its terms authorizes the local franchising authority to impose a franchise fee. [47 U.S.C. §542(a)] The term "franchise fee" is defined at §542(g)(2)(A) as:

> Any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly

> discriminatory against cable operators or cable subscribers);

From this definition, it is clear that franchise fees for the use of public rights-of-ways may be assessed and collected by local taxing authorities. It is equally clear that taxes of general application, such as the sales tax imposed by Act 188 of 1987, which have a rational basis for their classification, are contemplated and approved by the Policy Act.

To underscore that the ability to tax is not denied State and local governments, the Policy Act in Section 542(h)(1) provides in part:

> (1) Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system. . . .

The entire Policy Act evidences the prevailing federal principle to avoid excessive entanglement with matters of predominantly local concern. The Act forces administration of the law down to the local level, by utilizing the franchising method as the enforcement method to ensure compliance with the Act. As the Policy Act is not a limitation upon any authority to levy a tax, Petitioner's argument for preemption is unfounded.

## CONCLUSION

For the particular reasons stated above, the Respondent Timothy J. Leathers submits that the Petition for Certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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